

Tentative Rulings for June 2, 2016
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

15CECG01723 *Ferguson et al. v. Baumeister et al.* will be continued to Thursday, June 16, 2016 at 3:30 p.m. in Dept. 501

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

Tentative Rulings for Department 403

(20)

Tentative Ruling

Re: ***Ramos et al. v. Manco Abbott, Inc. et al.***, Superior Court
Case No. 14CECG02251

Hearing Date: **June 2, 2016 (Dept. 403)**

Motion: Motion for Summary Judgment / Adjudication by G. Drew
Gibson, Jr., as Trustee of The Gibson Community Property
Trust

Tentative Ruling:

To grant summary judgment in favor of defendant G. Drew Gibson, Jr., as Trustee of The Gibson Community Property Trust ("Gibson").

Explanation:

First, the court notes that it would have been best for the parties to have submitted supplemental opposition and reply points and authorities. It is not ideal to expect the court to go through the new evidence and figure out for the parties where it fits into their arguments.

Second, Gibson's written objections to plaintiffs' separate statement will not be considered. Evidentiary objections are to be made to the *evidence*, not the party's characterization of the facts in the separate statement. (See Cal. Rules of Court, Rule 3.1352, 3.1354.) None of the written objections are in the form required by the Rules of Court.

Third, the court notes that the motion is directed at all causes of action of the Second Amended Complaint ("SAC"). However, the fifth through ninth causes of action are asserted only against Manco Abbott. The motion is moot as to those causes of action.

However, the court finds that Gibson has succeeded in negating all causes of action against him, but establishing that Manco Abbott, the entity employing all individuals alleged to have engaged in wrongful conduct, was an independent contractor to Gibson, as opposed to an agent or employee.

The moving party in this case must make a prima facie showing that no triable issue of material fact exists as to each cause of action. This may be done by demonstrating that the opposing party lacks sufficient evidence to establish a question of fact. The burden then falls on opposing party to come forward with competent

evidence of specific facts demonstrating a triable issue. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, 854.)

As a general rule, the hirer of an independent contractor is not liable to third parties for the contractor's wrongs. (*Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 299.) "With some exceptions, an employer is vicariously liable for the negligent acts of its employees, but not of its independent contractors." (*Id.* at 299.) The determination of whether a person is an independent contractor or an employee may properly be decided as a question of law for the court unless such consideration is "dependent upon the resolution of disputed evidence or inferences." (*Id.* at 297 fn. 4.)

"The principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired." (*Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 531 (citing *S. G. Borello, supra*, 48 Cal.3d 341, 350.)

Gibson's management contract with Manco states that Manco Abbott is an independent contractor. (UMF 2.) The contract provides that Manco Abbott is the sole one to supervise and be responsible for employees. (See Management Contract ¶ 12; UMF 2). David Lazzarini (part owner of Preferred Community Management, Inc., and the sole contact between Manco Abbott and Gibson) and G. Drew Gibson, Jr., state in their declarations that Gibson had no right, did not exercise any right to supervise, manage or control any of Manco's employees, as such acts were the sole responsibility of Manco. Gibson had no contact with tenants, Manco Abbott, or Manco Abbott's employees. All contacts were done through Preferred Community Management. (UMF 2 and 3.) Preferred was never involved in any eviction discussions, or tenant or employee relations, and was never informed of plaintiffs' eviction or of their claims. (UMF 6.) The property management agreement provides that the agent, Manco Abbott, is responsible for complying with all laws and regulations affecting its employees. (UMF 7.) Neither plaintiff ever observed Gibson's direct involvement in any of the acts complained of. (UMF 8.)

Plaintiffs offer no evidence that actually creates any disputes of these facts, which is sufficient to satisfy Gibson's burden as the moving party.

Plaintiffs point out that the addendum to the property management agreement provides that Gibson "is solely responsible for compliance with all applicable laws and regulations relating to the Property," including the Americans with Disabilities Act. (Lazzarini Dec. Exh. 1, addendum ¶ 1.) Gibson also had the right to make decisions regarding whether to make architectural or structural modifications to the property to accommodate disabilities. (Response to UMF 2.) However, this is not indicative of right to control the manner and means of performing the work. These are major expenses that the principal would naturally sign off on.

Plaintiffs point out that paragraph 10 of the contract authorizes Manco Abbott to "institute actions in either the Owner's or Agent's name to obtain possession of premises." Paragraph 11 of the contract authorizes Manco Abbott to inspect premises and make repairs. Paragraphs 1 and 5 of the contract authorize Manco Abbott and its staff to

manage, supervise and operate the Property." (Response to UMF 5.) However, these provisions are supportive of the contention that Gibson did not retain the right to control the manner and means of Manco Abbott's work performed under the contract.

Plaintiffs assert that Manco Abbott employee Dan Limata communicated with the owner in regard to the three-day eviction notice issued to plaintiffs. (Response to UMF 3, 6; Berkley Depo. 55:11-23 (Schwin Supp. Dec. Exh. I.) While the evidence supporting this fact is clearly hearsay, no proper objection has yet been submitted as to this evidence. Even if the evidence is considered, it does not establish any actual involvement by Gibson in the eviction or knowledge of what was happening. The evidence is too vague to draw any conclusions or inferences in favor of plaintiffs.

Plaintiffs contend that FEHA creates non-delegable duties upon landowners. They point out that Government Code § 12955.6 states that nothing in this part shall be construed to afford fewer rights or remedies than the Fair Housing Amendments Act of 1988. When FEHA was enacted in 1992, the FHA was clear that property owners had a non-delegable duty not to discriminate in the sale or rental of property. (See, e.g., *Phiffer v. Proud Parrot Motor Hotel, Inc.* (9th Cir. 1980) 648 F.2d 548, 552 [discriminatory conduct on the part of a rental agent is attributable to the owner of a motel, apartment complex, or other public housing facility. The duty of the owner of such a facility to obey the laws relating to racial discrimination is non-delegable."])

However, no language creating a non-delegable duty exists in the FEHA statutes. No case law states that the duties are non-delegable. And in *Meyer v. Holley* (2003) 537 U.S. 280, the Supreme Court rejected the proposition that an owner or corporate principal has a non-delegable duty to prevent housing discrimination. Traditional vicarious liability rules apply. (*Id.* at p. 285.) Furthermore, the Ninth Circuit has recognized that *Phiffer's* non-delegable duty rule is no longer good law. (*Holley v. Crank* (9th Cir. 2005) 400 F.3d 667, 670.) Plaintiffs' contention that an owner is liable for discriminatory acts of an independent contractor is not supported by current law.

This principle applies whether the actual wrongdoer is alleged to be an agent or employee. The rules relating to duties, authority, and liabilities are applicable to employees as well as agents. (See Witkin, *Summary of California Law* (10th ed. 2005) Agency and Employment, § 4, p. 42; *Jackson v. AEG Live, LLC* (2015) 233 Cal.App.4th 1156, 1184 ["there is substantial overlap in the factors for determining whether one is an employee or an agent."]; BAJI 13.20.)

Meyer made clear that the non-delegable duty concept applies to alleged agents as well. The Court stated that "it is well established that the Act provides for vicarious liability," and that traditional vicarious liability rules ordinarily make principals or employers vicariously liable for acts of their *agents* or employees in the scope of their authority or employment." (537 U.S. 280, 285, emphasis added.) However, the court recognized that creating an absolute or non-delegable duty for housing discrimination claims constituted an impermissible extension of vicarious liability rules, nothing that the statute and legislative history say nothing about extending vicarious liability in this manner. A non-delegable duty "imposed upon a principal would 'go further' than the vicarious liability principles we have discussed thus far to create liability 'although [the

principal] has himself done everything that could reasonably be required of him,' [citation], and irrespective of whether the *agent* was acting with or without authority." (*Id.* at p. 290, emphasis added.)

Accordingly, plaintiffs cannot save the cause of action by claiming that Gibson is liable for the acts of its agent. As discussed above, Gibson has established that Manco Abbot was an independent contractor, not an agent or employee, for purposes of vicarious liability.

For this reason Gibson prevails on all causes of action asserted against it. Summary judgment should therefore be granted. It is unnecessary to address the remaining grounds raised in the moving papers, since this is dispositive.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: KCK **on** 05/31/16 .
 (Judge's initials) (Date)

(6)

Tentative Ruling

Re: ***Baldwin v. Aon Risk Services Companies, Inc.***
Superior Court Case No.: 14CECG00572

Hearing Date: June 2, 2016 (**Dept. 403**)

Motions: (1) By Defendants to permit Christopher Grey Campbell to appear as attorney pro hac vice;

(2) By Defendants to permit Eric Falkenberry to appear as attorney pro hac vice

Tentative Ruling:

To grant.

Applications are signed. No need to appear at the hearing.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: **KCK** on **05/31/16**.
 (Judge's initials) (Date)

(20)

Tentative Ruling

Re: **Coelho v. Coelho**, Superior Court Case No. 13CECG00113

Hearing Date: **May 26, 2016 (Dept. 403)**

Motion: Edward Coelho's Motion for Order in Aid of Arbitration and Stay of Proceedings

Tentative Ruling:

To deny.

Explanation:

Respondent Edward Coelho ("Edward") filed a motion titled "Motion For Order In Aid of Arbitration and Request for Stay of Proceedings." The motion is procedurally deficient in that it does not clearly state what "order in aid of arbitration" should be made, or identify what proceedings Edward wants stayed. A notice of motion must state in the first paragraph exactly what relief is sought and why (on what grounds). (Code Civ. Proc. § 1010; Cal. Rules of Court, Rule 3.1110(a).) The court cannot grant different relief, or relief on different grounds, than stated in the notice of motion. (See *People v. American Sur. Ins. Co.* (1999) 75 Cal.App.4th 719, 726.) The notice of motion is entirely vague as to what relief is sought.

This defect is not cured by the memorandum either of points and authorities. The memorandum does not clearly set forth what the court is to order the arbitrator to do, other than vaguely "to complete" the arbitration. The memorandum does not identify any other actions, such as by name and case number. The opening memorandum includes no discussion of the other action(s) that Edward wants stayed.

The motion would be denied on the merits as well.

"Order in aid of arbitration"

Edward apparently is requesting that the court to order Arbitrator Gilles to complete the arbitration that started in 2009 pursuant to the 1997 Agreement. Edward asserts that since this court's 2/4/14 Order correcting Gilles' 1/3/13 Award, he has issued multiple demands that Gilles complete the arbitration, but Gilles has not addressed the 2/4/14 Order, or made a final arbitration award. Edward says Gilles has refused to complete the pending arbitration, but he must do so consistently with the fact that he has no jurisdiction over Susan, and hence no jurisdiction to compel a transfer of any real property (since Family Code section 1102(a) provides that any attempt to transfer community property requires that both spouses join in executing any such instruments).

The court disagrees with Edward's characterization of the effect of the 2/4/14 Order. Edward argues that the order correcting the 1/3/13 Award "had the effect of eliminating any obligation *on the part of Edward* to transfer the 65.86 acres. It also had

the effect of eliminating any obligation on Susan or Edward's part to sign paperwork necessary to create a 65.86 acre parcel ..." (MPA 7:26-28, emphasis added.) That is incorrect. The Order did not relieve Edward of his obligations. It only excised any order directed at Susan. How things are wrapped up from here is a matter for the Arbitrator to address.

Additionally, Edward's assertion that Gilles has refused to complete the arbitration proceeding is not supported by admissible evidence. Counsel says there were "[s]everal exchanges of emails [that] took place between my office and Gilles in an effort to get him to action the Edward/Vincent Arbitration. To date, he has refused." (Gilmore Dec. ¶ 11.) However, no such emails are provided. This statement is entirely conclusory. It is not clear what, exactly Edward (or his counsel) asked Gilles to do, or what his response was. There is no evidentiary support for the assertion that Gilles has refused to move forward or complete the arbitration.

It appears that the more likely issue is Edward's unwillingness to participate in the arbitration. The opposition papers contend that Edward has ignored the pending arbitration proceeding and has refused to pay the arbitrator's fees. It is telling that Edward does not refute this assertion in his reply. If Edward isn't paying the arbitrator fees he is obligated to pay, the court should not issue an order directing Gilles to work for free.

Regarding the request to stay proceedings, again, the notice of motion does not indicate what actions Edward seeks to have stayed. The memorandum vaguely mentions "separate lawsuits in front of other judges" filed by Vincent, but never actually mentions or identifies any particular action. While the court assumes that Edward is seeking an order staying case numbers 15CECG00074 and maybe 15CECG00543 as well (though the latter is already stayed), the motion is just too vague insofar as it requests that the court stay other actions. The moving papers, especially the notice of motion, needs to be more explicit.

Moreover, if Edward feels the 2015 actions should be stayed, then he should file a motion to stay in those actions to be heard by the department and judge to which those actions are assigned. This motion appears to be an attempt to circumvent Judge Jeffrey Hamilton's order finding that the sublease is an enforceable agreement as to Susan, and Judge Donald Black's orders for injunctive relief, and associated contempt proceedings recently underway to deal with Edward's trespasses in breach of the sublease. The court agrees with Vincent that any motion to stay an action should be brought before the judge to whom the case is assigned. "After a petition has been filed under this title, the court in which such petition was filed retains jurisdiction to determine any subsequent petition involving the same agreement to arbitrate and the same controversy, and any such subsequent petition shall be filed in the same proceeding." (Code Civ. Proc. § 1292.6.)

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: **KCK** **on** **06/1/16** .
 (Judge's initials) (Date)

Tentative Rulings for Department 501

2

Tentative Ruling

Re: ***Heeren v. Express Delivery et al.***
Case No. 15CECG00193

Hearing Date: June 2, 2016 (Dept. 501)

Motion: Compel initial response to form interrogatories, set one, special interrogatories, set one, request for production of documents, set one and deem requests for admission, set one admitted and sanctions

In the event oral argument is requested it will be held on Tuesday, May 7th at 3:30 in Dept. 501.

Tentative Ruling:

To grant plaintiff Kendal Heeren's motions to compel defendant Express Delivery to provide initial verified responses to form interrogatories, set one, special interrogatories, set one and request for production of documents, set one. (Code of Civil Procedure sections 2030.290(b) and 2031.300(b).)

To grant plaintiff Kendal Heeren's motion that the truth of the matters specified in the requests for admission, set one, is to be deemed admitted as to defendant Express Delivery unless defendant serves, before the hearing, a proposed response to the requests for admission that is in substantial compliance with Code of Civil Procedure sections 2033.210, 2033.220 and 2033.240. Code of Civil Procedure §2033.280.

To grant plaintiff Kendal Heeren's motion for sanctions. Express Delivery is ordered to pay sanctions in the amount of \$1,027.50 to the law office of Seth Tillmon. CCP §§2030.290(c), 2031.300(c) and 2033.280(c).

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: MWS on 05/31/16 .
(Judge's initials) (Date)

Tentative Rulings for Department 502

(23)

Tentative Ruling

Re: ***Lyman Stratton v. Brian D. Strack***
Superior Court No. 15CECG03128

Hearing Date: Thursday, June 2, 2016 (**Dept. 502**)

Motion: Defendant Brian D. Strack's Demurrer to Plaintiff Lyman Stratton's First Amended Complaint

Tentative Ruling:

To take off calendar Defendant Brian D. Strack's demurrer to Plaintiff Lyman Stratton's first amended complaint. (Code Civ. Proc., § 430.41, subd. (a).)

The Court orders Plaintiff's and Defendant's counsel to meet and confer in person or by telephone as required by Code of Civil Procedure section 430.41, subdivision (a). If the parties do not reach an agreement resolving the objections raised in the instant demurrer, Defendant may obtain a new hearing date for the instant demurrer. If a new hearing date is obtained, Defendant must file a new meet and confer declaration as required by Code of Civil Procedure section 430.41, subdivision (a)(3) at least 16 court days, plus any additional time as required for service of the declaration, before the new hearing date. If, after meeting and conferring, Plaintiff agrees to amend its first amended complaint, Plaintiff and Defendant may file a stipulation and order for leave to file a second amended complaint, which will be granted by the Court without need for a hearing. (Cal. Rules of Court, rule 3.1207(4); Superior Court of California, County of Fresno Local Rules, Rule 2.7.2.)

Explanation:

On April 18, 2016, Defendant Brian D. Strack ("Defendant") filed a demurrer to Plaintiff Lyman Stratton's ("Plaintiff") first amended complaint pursuant to Code of Civil Procedure section 430.10, subdivisions (b), (e), and (f).

In order to demonstrate that Defendant complied with the meet and confer requirement of Code of Civil Procedure section 430.41, subdivision (a) before filing his demurrer, Defendant has filed the declaration of his counsel, Roger S. Bonakdar. Mr. Bonakdar's declaration states that, in order to satisfy the meet and confer requirement, he sent a meet and confer letter to Plaintiff's counsel's office, but that he did not receive a response to his letter. (Declaration of Roger S. Bonakdar, ¶¶ 4-5 & Exhibit 1.) However, since Code of Civil Procedure section 430.41, subdivision (a) requires that the meet and confer process be conducted "in person or by telephone[.]" Defendant has failed to establish that he sufficiently met and conferred with Plaintiff before filing his demurrer as required by Code of Civil Procedure section 430.41, subdivision (a).

Accordingly, the Court takes the hearing on Defendant's demurrer off calendar. The Court orders Plaintiff's and Defendant's counsel to meet and confer in person or by telephone as required by Code of Civil Procedure section 430.41, subdivision (a).

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: DSB **on** 05/31/16.
(Judge's initials) (Date)

(29)

Tentative Ruling

Re: ***Jonathan Munro v. Joseph Dishyan, et al.***
Superior Court Case No. 15CECG03135

Hearing Date: June 2, 2016 (Dept. 502)

Motions: Motions to compel; sanctions

Tentative Ruling:

Defendants' motions to compel initial verified responses to form interrogatories (general); form interrogatories (limited); special interrogatories; and demand for inspection of documents are moot, as responses have now been provided. (Code Civ. Proc. §§ 2030.290(b), 2031.300(b).)

To grant Defendants' motion for sanctions. Plaintiff Jonathan Munro and his counsel are ordered, jointly and severally, to pay monetary sanctions to the law offices of Carbone, Smoke, Smith, Bent & Leonard in the amount of \$540 within 30 days after service of this order. (Code Civ. Proc. §§2030.290(c), 2031.300(c).) Of note to counsel for Plaintiffs, payment is required for each motion filed, and the fee is \$60 per motion. (Gov. Code §70617(a); see Statewide Civil Fee Schedule, effective January 1, 2015.)

Pursuant to California Rules of Court, rule 3.1312, and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: DSB on 05/31/16.
(Judge's initials) (Date)

(19)

Tentative Ruling

Re: **Templeton v. Kia Motors America**
Superior Court Case No. 11CECG04207

Hearing Date: June 2, 2016 (Department 502)

Motion: by plaintiff for leave to file a First Amended Complaint

Tentative Ruling:

To deny.

Explanation:

1. The proposed amendment lacks merit. (*Yee v. Mobilehome Park Rental Review Board* (1998) 62 Cal. App. 4th 1409, 1429.) Plaintiff has testified to an inability to recall representations by Kia sales personnel. Allegations as to defects in roof structure and the electronic stability control system were long ago dismissed. Plaintiff's expert has testified that the seat belts locked and stayed locked.

2. The proposed amendment creates prejudice. It revives dismissed claims and asserts facts denied by plaintiff at her deposition. It therefore represents new factual matter previously unknown to defendants only approximately one month from trial.

3. There is substantial delay in offering the amendment. The facts forming the basis for the proposed amendment have been known for months, if not longer. The case is four and one-half years old, all discovery has closed, and trial is near. (*Magpali v. Farmers Group* (1996) 48 Cal. App. 4th 471, 488; *P&D Consultants, Inc. v. City of Carlsbad* (2010) 190 Cal. App. 4th 1332, 1345.)

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: DSB on 05/26/16.
(Judge's initials) (Date)

(17)

Tentative Ruling

Re: ***Compassionate Care Home Health Agency, LLC v. Amorino et al.***
Court Case No. 12 CECG 02248

Hearing Date: June 2, 2016 (Dept. 502)

Motion: Defendants' Motion for Attorney's Fees

Tentative Ruling:

To deny.

Explanation:

Defendants move for an award of attorney's fees as prevailing parties on plaintiff's claim under California's Uniform Trade Secret Act, Civil Code 3426 et seq. ("the UTSA"). Civil Code section 3426.4 provides: "If a claim of misappropriation [of trade secrets] is made in bad faith, ... the court may award reasonable attorney's fees and costs to the prevailing party." " 'Although the Legislature has not defined "bad faith" ' for purposes of section 3426.4, 'our courts have developed a two-prong standard: (1) objective speciousness of the claim, and (2) subjective bad faith in bringing or maintaining the action, i.e., for an improper purpose.' " (Cypress Semiconductor Corp. v. Maxim Integrated Products, Inc. (2015) 236 Cal.App.4th 243, 260 (Cypress), quoting FLIR Systems, Inc. v. Parrish (2009) 174 Cal.App.4th 1270, 1275 (FLIR).)

Setting aside the question of the objective speciousness of the claim, the court finds that defendants have failed to carry their burden of establishing that the action was litigated with subjective bad faith. (Corbett v. Hayward Dodge, Inc. (2004) 119 Cal.App.4th 915, 926 ["Courts have uniformly held that the party moving for statutory attorney fees or sanctions has the burden of proof."].)

Subjective Bad Faith

Subjective bad faith under the UTSA " 'means simply that the action or tactic is being pursued for an improper motive.' " (Gemini Aluminum Corp. v. California Custom Shapes, Inc. (2002) 95 Cal.App.4th 1249, 1263 (Gemini).) This includes acting with " 'the intention of causing unnecessary delay, or for the sole purpose of harassing the opposing side.' " (Ibid.) Determining whether a plaintiff maintained a UTSA claim in bad faith " 'involves a factual inquiry into the plaintiff's subjective state of mind [citations]: Did he or she believe the action was valid? What was his or her intent or purpose in pursuing it?' " (Ibid.) Because a subjective state of mind will rarely be susceptible of direct proof, the trial court is ordinarily required to infer it from circumstantial evidence. (Ibid.) "The timing of the action may raise an inference of bad faith. [Citation.] Similar inferences may be made where the plaintiff proceeds to trial after the action's fatal

shortcomings are revealed by opposing counsel." (*FLIR, supra*, 174 Cal.App.4th at p. 1278.)

"Any question of a plaintiff's good faith must take into account, and will typically begin, with an examination of the plaintiff's own pleadings and such proofs as he or she may have introduced into the record." (*Cypress, supra*, 236 Cal.App.4th at p. 260.) Contrary to the allegations of defendants, the pleadings in this action do not disclose subjective bad faith. A UTSA claim was always maintained by plaintiff. And while the other initial tort claims were specious, being completely preempted by the UTSA, defendants failed to challenge them until fairly late in the litigation. Nor did the case end in the pleading stage of litigation. (Compare *Id.* at p. 258 [no reason to believe plaintiff was in any position to amend its way past the pleading stage].) The types of trade secrets designated by plaintiff, customer lists and pricing/costing information, are in fact valid types of trade secrets. (See *Reeves v. Hanlon* (2004) 33 Cal.4th 1140, 1155; *Whyte v. Schlage Lock Co.* (2002) 11 Cal.App.4th 1443, 1455-1456.)

Defendants have pointed to nothing that would suggest bad faith. For example, the case is utterly dissimilar to *FLIR, supra*, 174 Cal.App.4th 1270 and *Cypress, supra*, 236 Cal.App.4th 243.

In *FLIR, supra*, 174 Cal.App.4th 1270, the trial court found the plaintiff maintained the action in bad faith with expert testimony that lacked a scientific basis and failed to address the possibility that defendants could lawfully acquire the subject technology from a third party. (*Id.* at p. 1281.) The trial court also found bad faith in the plaintiff's failure to identify what trade secrets would be subject to a permanent injunction, failure to list the trade secrets generally in the injunction, and attempt to unlawfully restrain defendants' trade in the injunction. (*Ibid.*) Finally, the trial court found the FLIR plaintiff maintained the action in bad faith by imposing unnecessary settlement conditions, including demanding \$75,000, a non-competition agreement, an agreement that defendants would not hire plaintiffs' employees, or challenge certain patent applications. (*Id.* at p. 1282.) The defendants testified the \$75,000 demand was "inflammatory," and the trial court found that the other settlement terms were not related to the trade secret action and were made for an anticompetitive or unlawful purpose. (*Ibid.*)

In *Cypress, supra*, 236 Cal.App.4th 243, the appellate court found the parties' pre-lawsuit correspondence supported a reasonable inference that the actuating motive of the plaintiff's president was to scare defendant away from attempting to hire any of the plaintiff's touchscreen employees under any circumstances, lawfully or otherwise. (*Id.* at p. 265.) To highlight just one instance of a threatening letter, the president of plaintiff had sent a letter accusing the defendant of trying to steal proprietary information, by "illegally targeting" its employees and threatening legal action for same. However, the president later admitted that employees could change jobs whenever they wanted. (*Ibid.*) Another letter supported an inference that the purpose of the lawsuit was to impose a financial penalty upon, and thereby deter, the defendant's attempts to hire the plaintiff's technical employees. "Indeed, it might be inferred that the purpose of the lawsuit was to inhibit not only [the defendant] but other competitors as well from attempting to engage in the same, entirely lawful conduct."

(*Id.* at p. 269.) Finally, the Court drew inference of dilatory and oppressive intent is from the plaintiff's belated and evasive response to the defendant's demand for specification of the trade secrets at issue and the plaintiff's objection to an interrogatory as "vague and ambiguous" when it asked the plaintiff to " 'identify' what you allege in the complaint to be 'confidential' and a 'trade secret.' "

Defendants appear to contend that the extreme lack of merit of plaintiff's case is evidence of plaintiff's subjective bad faith. They contend that each of the complaints lacked objective merit. However the case survived the pleading stage and proceeded to trial.

Defendants also contend that the discovery phase of trial, particularly, Ms. Kaleka's deposition, revealed that plaintiff was unable to establish either misappropriation, or that the misappropriation caused harm. Again, that a witness lacks personal information does not preclude proof by other means, especially where there is no reason to suppose the witness would have been present to observe the critical facts. (*Villa v. McFerren* (1995) 35 Cal.App.4th 733, 749.)

Defendants take specific issue with the misappropriation claim as based on speculation that Amorino took secrets while preparing to change employers. (See *SASCO v. Rosendin Elec., Inc.* (2012) 207 Cal.App.4th 837, 848-849.) Moreover they string cite authorities that hold that an employee may prepare to compete with his or her employer. (*Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 414; *Fowler v. Varian Associates, Inc.* (1987) 196 Cal.App.3d 34, 41; *Bancroft-Whitney Co. v. Glen* (1966) 64 Cal.2d 327, 346.) Defendants also argue that plaintiff's claim that defendants hired away plaintiff's employees was without merit. (*SASCO v. Rosendin Elec., Inc.*, *supra*, 207 Cal.App.4th at p. 848.) However, it remains that these arguments go to the merits of plaintiff's case, not the bad faith of plaintiff's prosecution of the case. "The absence of evidence alone, even after discovery, does not support a finding of subjective bad faith." (*Id.* at p. 847.) Defendants point to no threats from plaintiffs, no letters from defendants pointing out the deficiencies of plaintiff's case, no responses from plaintiff evincing a desire for litigation for an improper purpose, no stonewalling in discovery, and no naked attempts at restraint of trade. In short, there is nothing in the record that shows that shows subjective bad faith or improper motive on the part of plaintiff.

Accordingly, the motion for attorney's fees is denied.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: DSB **on** 05/31/16.
(Judge's initials) (Date)

Tentative Rulings for Department 503

(24)

Tentative Ruling

Re: ***Abarca v. Fairbanks***
Court Case No. 13CECG03510

AND

Perez v. Fairbanks
Court Case No. 14CECG00220

Hearing Date: **June 2, 2016 (Dept. 503)**

Motion: Motion to Consolidate

Tentative Ruling:

To grant the motion to consolidate, making this a complete consolidation of both cases. Case #13CECG03510, *Abarca v. Fairbanks*, shall be the lead case (Dept. 503, Judge Simpson presiding). All further documents filed in the consolidated case shall be filed only in the lead case, and shall include the caption and case number of the lead case, followed by the case number of the other consolidated case, #14CECG00220, *Perez v. Fairbanks*. The court sets a Case Management Conference in Dept. 503 on Tuesday, August 30, 2016, at 3:30 p.m. The Dismissal Hearing currently set in the *Abarca* action for Monday, October 24, 2016, at Conference Room 104 at 1:00 p.m. will remain on calendar, pending further development at the CMC. The trial date in the *Perez* action of November 28, 2016 is vacated.

Explanation:

Code of Civil Procedure section 1048, subdivision (a) provides: "When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all of the matters in issue in the actions, it may order all the actions consolidated, and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." Moving defendant has complied with the requirements of California Rules of court, rule 3.350, subdivision (a)(1), in making this motion to consolidate. No opposition has been filed. Complete consolidation is appropriate.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling

Issued By: A.M. Simpson on 6/1/16.
(Judge's initials) (Date)

(5)

Tentative Ruling

Re: ***State of California, acting by and through the State Public Works Board v. Paul Singh, Trustee of the Paul Singh Family Trust et al.***
Superior Court Case No. 15 CECG 02669

Hearing Date: June 2, 2016 (**Dept. 503**)

Motion: Order for Possession of Parcels FB-10-0422-1 and FB-10-0422-2

Tentative Ruling:

To deny the motion without prejudice.

Explanation:

The applicable statute requires that the motion for an order of possession describe the property sought to be taken, which may be by reference to the complaint, and the date after which the plaintiff is seeking to take possession. The motion **must** include a statement regarding the property owner's right to oppose the order, which includes notice of the 30-day time limit for filing a written opposition. (CCP § 1255.410(a). **The plaintiff must serve a copy of the motion on the record owner and on any occupants.** The plaintiff must set the hearing on the motion not less than 60 days after service for unoccupied property and 90 days after service for an occupied dwelling, farm, or business operation. (CCP § 1255.410(b).)

Here, the motion was properly set not less than 90 days after service of the notice of motion on the record owner of the occupied property. See proofs of service of motion filed on February 25, 2016 showing personal service on Paul Singh and Swaranjit Singh on February 17, 2016. The proper warning was given to the Defendant re: opposition. See Notice of Motion at page 2 lines 10-16. In addition, when the motion is not opposed within 30 days of service, the court must make an order for possession if it finds that (a) the plaintiff is entitled to take the property by eminent domain, and (b) the plaintiff's deposit satisfies statutory requirements. (CCP § 1255.410(d)(1).)

But, the Declaration of Granados refers to residences and buildings on the property. See ¶11. As a result, there should have been a statement by Plaintiff's counsel, Ms. Chang regarding service of the summons and complaint on the occupants or a statement that she has confirmed that there is no tenant on the property. Any tenant in legal possession of the residence has an interest in the proceedings. See CCP § 1255.410(b). The statement by Granados that the acquisition of the property will not affect the residence and/or buildings does not address the legal requirements of notice. In the motion at bench, **no notice was given to the occupant(s)** of the residence on the property. This is required. See CCP § 1255.410(b). Therefore, the motion will be denied without prejudice.

Pursuant to California Rules of Court, Rule 391(a) and Code of Civil Procedure § 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: A.M. Simpson **on** 6/1/16.
(Judge's initials) (Date)